BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

THE MISSOURI SMALL TELEPHONE COMPANY GROUP'S COMMENTS REGARDING CMRS PETITIONERS' PETITION FOR DECLARATORY RULING

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I. SUMMARY

In their Petition for Declaratory Ruling, CMRS Petitioners T-Mobile USA, Inc. (formerly VoiceStream Wireless), Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners, Inc. ask the Commission "to reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act [the 1996 Act] and the Commission's LEC-CMRS Interconnection policies." CMRS Petitioners specifically complain that Missouri's small ILECs have "bypassed the bilateral negotiation process" mandated by the Act and have "unilaterally set unfair and unlawful terms and conditions" for interconnection through their wireless termination service tariffs filed with and approved by the Missouri Public Service Commission (MoPSC).

On the contrary, it is the CMRS Petitioners who have failed to avail themselves of their rights under the Act to request negotiations with Missouri's small, rural ILECs. More importantly, it is the CMRS Petitioners who have violated MoPSC orders and interconnection agreement requirements to enter into reciprocal compensation arrangements or interconnection agreements with Missouri's small ILECs before terminating wireless traffic to them. Instead, the CMRS Petitioners have ignored legitimate business practice to establish rates, terms and conditions for the use of the small companies' facilities and services before availing themselves of such use. As a consequence, many of the Missouri Small Telephone Company Group (MoSTCG) member companies[1] were forced to file wireless termination service tariffs because most CMRS

[1] *See* ATTACHMENT A.

carriers, including the CMRS Petitioners, continued to terminate their wireless traffic to the small companies without agreements and without paying for it.

The MoSTCG's wireless tariffs are not prohibited by the Act nor are they contrary to the Commission's implementing rules because these tariffs only apply in a situation where there are no interconnection agreements or reciprocal compensation arrangements. The tariffs are expressly superceded by an approved interconnection or compensation agreement under the Act. The MoSTCG's wireless tariffs do not purport to replace an interconnection agreement or reciprocal compensation arrangement under the Act and, therefore, they do not conflict with the Act's rules regarding interconnection agreements and reciprocal compensation arrangements. If the CMRS Petitioners are unhappy with these wireless tariffs, then all they have to do is negotiate an appropriate agreement in accordance with the Act.

Incredibly, the CMRS Petitioners contend that it is the MoSTCG's obligation to initiate interconnection and/or reciprocal compensation negotiations with the CMRS carriers. The CMRS Petitioners' contention turns the Act on its head. Under the Act, it is the CMRS Petitioners, not the MoSTCG, who have the right to request interconnection and/or reciprocal compensation negotiations. Under the Act, it is the MoSTCG, not the CMRS providers, who have the obligation to negotiate in good faith to establish such interconnection agreements and/or reciprocal compensation arrangements. Under the Act, CMRS Petitioners have the right to pursue arbitration if they are unable to agree to the rates, terms and conditions for interconnection agreements and/or reciprocal compensation arrangements. And, if it is not obvious from a plain reading of the Act that the burden is upon the CMRS Petitioners to request negotiations, the

MoPSC has clearly and unequivocally put that burden on all CMRS carriers when it stated in its December, 1997, *Report and Order* as follows:

> **Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement** with such Other Telecommunication Carriers to directly compensate that carrier for the termination of such traffic.[2]

It was only when CMRS carriers failed to comply with the Commission's directive and continued to send traffic without an agreement and without compensating them for that traffic that the MoSTCG companies were compelled to file their wireless tariffs.

For the CMRS Petitioners to now claim that they are the victim of a unilateral effort by the MoSTCG to establish unfair and unlawful rates, terms and conditions for the termination of the CMRS Petitioners traffic is simply not true. Furthermore, for the CMRS Petitioners to suggest that MoSTCG companies have somehow been compensated for this wireless traffic based upon a "de facto" bill-and-keep arrangement is a misstatement of the facts and the law. First, the MoSTCG companies never agreed to a bill-and-keep arrangement with CMRS Petitioners. Second, bill-and-keep, by the Commission's own rules, may only be imposed by a state commission where the traffic is "roughly balanced," not by a unilateral decision of a CMRS provider. 47 CFR § 51.713. In Missouri, the MoPSC determined that the traffic was virtually all one way (i.e., mobile to landline), and the MoPSC held that the MoSTCG companies should be compensated for the use of their facilities and services in terminating this traffic.

The following comments of the MoSTCG will demonstrate that wireless tariffs are neither

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[2] *In the Matter of Southwestern Bell Telephone Company*, MoPSC Case No. TT-97-524, *Report and Order*, issued December 23, 1997 (emphasis added).

unlawful nor unreasonable; that they are necessary in order to ensure that Missouri's small ILECs are compensated for the use of their facilities; and that they provide an appropriate incentive to CMRS carriers to pursue the negotiations envisioned by the Act and required by the MoPSC.

II. RESPONSE TO CMRS PETITIONERS

A. Wireless termination tariffs are appropriate for traffic that is delivered to the small rural companies in the absence of an approved compensation or interconnection agreement.

The CMRS Petitioners ask the Commission to "reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements" between local exchange carriers (LECs) and commercial mobile radio service (CMRS) providers. The CMRS Petitioners' request is misleading and should be denied. The Act did not void the numerous wireless tariffs in existence across the country before the Act was passed. Indeed, RBOCs such as Southwestern Bell Telephone Company (SWBT) have had, and continue to have, wireless termination tariffs that apply to wireless-originated traffic unless and until a compensation or interconnection agreement is approved.[3] The Act simply provides wireless carriers with a mechanism to negotiate and, if necessary, arbitrate interconnection agreements and reciprocal compensation arrangements. The FCC has never issued a ruling that would void existing wireless

[3] *See In the Matter of Mark Twain Rural Telephone Company,* MoPSC Case No. TT-2001-139, *Report and Order,* issued February 8, 2001, p. 44.

tariffs nor have the CMRS Petitioners offered a citation for such a ruling.[4]

State commissions may impose requirements or prescribe regulations that are not inconsistent with the Act. 47 U.S.C. § 261. In fact, the Act preserves state commission authority to enforce any regulation, order, or policy that establishes access and interconnection obligations so long as it is consistent with the Act. 47 U.S.C. § 251(d)(3). Therefore, if wireless-originated traffic is being delivered to small rural ILECs in the absence of an approved compensation or interconnection agreement under the Act, then state commissions may enforce existing wireless termination tariffs or approve new wireless termination tariffs.

Federal courts have also observed that states may enforce tariff provisions which are not inconsistent with the Act. In *Michigan Bell v. MCI*, 128 F.Supp.2d 1043 (E.D. Mich. 2001), the U.S. District Court for the Eastern District of Michigan held that states "cannot enforce a tariff in a manner that violates a party's rights under negotiated interconnection agreement." *Id*. at 1054. However, the *Michigan Bell* court explained, "**State tariffs are obviously not agreements approved under the Act. Further, tariffs are inherently different from interconnection agreements**." *Id.* at 1060 (emphasis added). The *Michigan Bell* court concluded, "pursuant to the Act, **the State may impose and enforce tariff provisions**, but cannot enforce a tariff in a manner that violates a party's rights under negotiated interconnection agreement." *Id*. at 1054 (emphasis added).

State law tariffs have not been preempted by the Act, and carriers must still request

[4] CMRS Petitioners' citations to 1987 and 1989 decisions of the Commission are inappropriate as they predate the 1996 Act and its clear requirements that ILECs must negotiate in good faith interconnection agreements and/or reciprocal compensation arrangements. The 1996 Act also requires ILECs to participate in mandatory arbitration if such negotiations fail.

interconnection agreements. For example, in *U.S. West Communications v. Sprint et al.*, 275 F.3d 1241(10th Cir. 2002), the court explained that there is an incentive for carriers to negotiate prices and terms that are more favorable than those set forth in a local exchange company's existing tariffs. *Id*. at 1250. In that case, the parties agreed that **carriers have "the right to purchase services from an ILEC pursuant to an ILEC's tariffs without negotiating an interconnection agreement."** *Id*. at note 10 (emphasis supplied). Thus, the Tenth Circuit allowed tariffs to be used in conjunction with the interconnection provisions of the Act.

Most recently, the Ninth Circuit addressed a case where wireless traffic was being delivered in the absence of an agreement under the Act. In the *Three Rivers Telephone Cooperative* case, the court explained how the filed tariff doctrine applies to traffic that is delivered in the absence of an agreement under the Act:

> **Because the Independents' tariffs form the exclusive source of the obligations between the independents and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, 47 U.S.C. § 251-52, without interpreting the tariffs themselves**.

Three Rivers Telephone Cooperative v. U.S. West Communications, (9th Cir. 2002), No. 01-35065, *Memorandum Opinion*, filed August 27, 2002.

If wireless carriers dislike a LECs' wireless tariff, then the Act provides the wireless carriers with a mechanism to obtain reciprocal compensation agreements that establish terms, conditions, and rates for the exchange of local traffic. The Act requires incumbent LECs (ILECs) to negotiate and, if necessary, arbitrate such agreements with requesting carriers. *See* 47 U.S.C.

§§ 251 and 252. In fact, this is exactly what the vast majority of the wireless carriers have done with the large ILECs in Missouri. The MoSTCG recognizes its duties and responsibilities to negotiate and arbitrate reciprocal compensation arrangements with wireless carriers. However, wireless carriers must request such agreements. If the CMRS Petitioners choose to send wireless-originated traffic to the MoSTCG companies in the absence of such an agreement, then the MoSTCG companies are entitled to compensation pursuant to the wireless termination tariffs that were approved by the MoPSC.

B. Indirect Interconnection

The CMRS Petitioners claim that "a CMRS carrier typically will interconnect indirectly with a rural ILEC (*i.e.*, traffic will be exchanged through an intermediate carrier.)" Although this is true in some circumstances, indirect interconnection does not presuppose a reciprocal compensation agreement. Rather, wireless carriers must negotiate or arbitrate such agreements under the clear procedures in the Act. Otherwise, wireless carriers could simply send traffic to small rural exchanges without paying anything for the use of the small ILECs' facilities and services. In fact, this is exactly what the CMRS Petitioners have been doing unlawfully since 1998, and they hope to legitimize this unlawful practice through their Petition for Declaratory Ruling.

The fact that the wireless carriers have indirectly connected their networks with those of small ILECs does not mean that a reciprocal compensation arrangement automatically exists. Such an arrangement must be requested, negotiated (and, if necessary, arbitrated), and then

approved by the state commission. 47 U.S.C. § 252. Nothing in the Act allows for interconnection or, more importantly, reciprocal compensation without appropriate contracts and compensation arrangements. Nevertheless, many of the wireless carriers, such as the CMRS Petitioners, have sidestepped the Act by sending traffic to the MoSTCG companies in the absence of interconnection agreements or compensation arrangements. By doing so, the CMRS Petitioners have failed to comply with the Act.

The Federal Communications Commission (FCC) has clearly drawn a distinction between the duty to interconnect and the duty to transport and terminate traffic:

> We have previously held that the term "**interconnection" refers solely to the physical linking of two networks, and not the exchange of traffic between networks**. In the *Local Competition Order*, we specifically drew a distinction between "interconnection" and "transport and termination", and concluded that the term "interconnection," as used in Section 251(c)(2), does not include the duty to transport and terminate traffic. Accordingly, Section 251(c)(2) of our rules specifically defines "interconnection" as "the linking of two networks for the mutual exchange of traffic," and states that this term "does not include the transport and termination of traffic."

In the Matter of Total Telecommunications Services Inc. and Atlas Telephone Company Inc. v. AT&T Corp., File No. E-97-003, *Memorandum Opinion and Order*, p. 111, released March 13, 2001, p. 11 (footnotes omitted and emphasis added).

Thus, the fact that two carriers' networks are indirectly interconnected or "linked" does not presuppose an agreement to exchange local traffic. Rather, there must be an agreement to do so, and such an agreement can be negotiated pursuant to § 251(b)(5). In the absence of such an agreement or arrangement to exchange local traffic in accordance with § 251(b)(5), it is entirely appropriate for a tariff to define the rates, terms, and conditions for the termination of this traffic. This is exactly

what SWBT's wireless interconnection tariff has done in Missouri since 1984.

Agreements under the Act do not just come into being by themselves; they must first be requested and negotiated. Under the Act, only those rules that were made effective immediately took effect immediately and were not dependent upon the existence of an interconnection agreement. *TSR Wireless LLC v. U.S. West Communications, Inc*., 15 FCC Rcd 11166, 11183 ¶ 28. Thus, the CMRS Petitioners should use the procedures in the Act, and the FCC has stated:

> [T]o the extent that other Commission rules promulgated under the Local Competition Order were not made 'effective immediately,' **we would expect that requesting carriers would utilize the interconnection agreement process of sections 251 and 252 to obtain services under section 251**.

Id. at fn 97 (emphasis added).

Under 47 C.F.R. § 51.703(a), "Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier." This rule is not made effective immediately because it requires LECs to establish reciprocal compensation arrangements **upon request**. The FCC explained:

> Thus, we anticipate that the sections 251 and 252 interconnection agreement process will utilize the sections 251(b) and (c) obligations and the Commission's implementing rules as a starting point for negotiations and that **requesting carriers may negotiate different terms through that process**.

TSR Wireless, 15 FCC Rcd at 11183, fn. 97 (emphasis added). Hence, the FCC did not presuppose that reciprocal compensation agreements took effect immediately; rather, they must be requested and negotiated (or arbitrated if negotiations fail).

Wireless carriers and large ILECs have used the procedures in the Act and established agreements that allow the large ILECs to receive compensation for transporting and terminating wireless traffic. Unfortunately, most wireless carriers are using their interconnections with the large ILECs to send traffic to small rural LECs without negotiating compensation or interconnection agreements as required by the Act. In Missouri, the MoSTCG companies that filed wireless tariffs did so because the CMRS Petitioners have been sending wireless calls to their rural exchanges for years in the absence of approved compensation or interconnection agreements. Instead, the CMRS Petitioners have used their connections with SWBT to send traffic over an indirect connection without even attempting to negotiate agreements. Thus, the CMRS Petitioners have sidestepped the procedures in the Act and gamed the system in order to avoid paying the small companies for the use of their facilities and services.

C. The CMRS Petitioners have no approved bill-and-keep agreements with the STCG Companies.

There is no approved bill-and-keep arrangement between the CMRS Petitioners and the Missouri STCG companies. The CMRS Petitioners claim that "indirectly interconnecting carriers often exchange traffic pursuant to a bill-and-keep arrangement, rather than an interconnection agreement, at least for mobile-to-land traffic." But the Missouri STCG companies have never agreed to a bill-and-keep arrangement with the CMRS Petitioners. The truth is that the CMRS Petitioners are sending wireless traffic in the absence of an agreement. Simply put, the CMRS

Petitioners are unlawfully using the facilities of the MoSTCG companies and attempting to justify what amounts to theft of service with a contrived "de facto bill-and-keep" argument.

The CMRS Petitioners propose that, in the absence of an approved interconnection agreement or compensation arrangement, traffic should be exchanged on a bill-and-keep basis, and the CMRS Petitioners imply that this is an acceptable default arrangement allowed under the Act. The FCC should reject the CMRS Petitioners' efforts to avoid compensating the MoSTCG companies by altering the meaning of bill-and-keep.

The *Interconnection Order* explains that state commissions may impose bill-and-keep arrangements in the context of arbitrations between carriers. The *Interconnection Order* states, "[I]t is clear that bill-and-keep arrangements may be imposed **in the context of the arbitration process** for termination of traffic, at least in some circumstances." (¶ 1111)(emphasis added). Part 51 of the FCC's Rules make it clear that a bill-and-keep arrangement is one of three alternatives that a state commission may use in setting transport and termination rates, but only under certain circumstances. *See* 47 CFR §51.705 and §51.713.

Moreover, the FCC has determined that such a bill-and-keep arrangement may be imposed where: (1) neither carrier has rebutted the presumption of symmetrical rates; and (2) the volume of traffic flowing in each direction is approximately equal. *See* 47 CFR 51.713(b). Nowhere in the Act or in the FCC's rules are carriers given the right to unilaterally impose bill-and-keep arrangements on other carriers as the CMRS Petitioners seek to do. In Missouri, the MoSTCG companies have demonstrated that their costs (and therefore their rates) are high, and that the volume of traffic flowing from the wireless carriers to the small companies is much higher than the

traffic flowing in the other direction.[5] Therefore, the FCC should reject the CMRS Petitioners' attempts to disguise their theft of service as a "de facto" bill-and-keep arrangement. Neither the Act nor state law can condone the CMRS Petitioners' efforts to use the small companies' facilities and services without payment.

D. The History of Interconnection in Missouri

Prior to the 1996 Act, wireless-originated calls were carried by either an IXC or SWBT. When the IXCs carried the traffic, the small rural companies were compensated via their existing access tariffs. However, when SWBT carried the calls, the small companies were not compensated. During the 1980s and early 1990s, SWBT's wireless termination tariff allowed wireless carriers to send and complete wireless calls to the MoSTCG companies' exchanges as well as SWBT exchanges. Thus, wireless carriers were able to send calls to the MoSTCG exchanges via their interconnection with SWBT in the absence of a compensation or interconnection agreement. SWBT did not provide any compensation to the MoSTCG companies for the use of their networks in completing these wireless-originated calls.

In a series of cases, the Missouri Public Service Commission found that SWBT was liable for payment of terminating access for the wireless traffic that was being delivered by SWBT to

[5] *In the Matter of Mark Twain Rural Telephone Company's Wireless Termination Service Tariff*, Case No. TT-2001-139, *Report and Order*, issued February 8, 2001, p. 17 ("[I]t is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. This is because traffic to CMRS subscribers from the small LECs' subscribers is transported by IXCs and treated as toll traffic.")

other LECs, including the MoSTCG companies.[6] Thereafter, until February of 1998, SWBT paid the MoSTCG companies their respective terminating access rates to complete the wireless calls to customers located in the MoSTCG companies' exchanges.

On June 5, 1997, SWBT filed revised wireless termination tariff sheets which sought to eliminate SWBT's liability to the MoSTCG companies for terminating access charges. The MoSTCG opposed SWBT's proposed tariff revision. Eventually, the Commission did allow SWBT to make certain changes to its wireless termination tariff, including the elimination of SWBT's obligation to pay the MoSTCG companies for wireless traffic which SWBT delivers to them.[7] SWBT's wireless termination tariff became effective on February 6, 1998, and SWBT was no longer required to compensate the MoSTCG companies for wireless-originated traffic delivered pursuant to SWBT's revised tariff.[8]

When SWBT revised its tariff, the MoPSC required SWBT to create and pass Cellular Transiting Usage Summary Reports (CTUSRs) that measure the amount of monthly wireless terminating traffic that is being delivered to the MoSTCG companies. These CTUSRs show the minutes of terminating use to each MoSTCG company from each wireless carrier, but the

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[6] *In the Matter of United Telephone Company*, Case No. TC-96-112, *Report and Order*, issued April 11, 1997; *Chariton Valley and Mid-Missouri's Complaints against SWBT for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-240, *Report and Order*, issued June 10, 1999.

[7] *In the Matter of SWBT's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff*, Case No. TT-97-524, *Report and Order*, issued Dec. 23, 1997.

[8] It is significant to note that at no time prior to the 1996 Act were Missouri's small ILECs not compensated for wireless traffic terminated to their exchanges. In other words, there was never a bill-and-keep arrangement in place prior to the CMRS carriers become responsible for the termination of this traffic.

CTUSRs do not distinguish between intraMTA and interMTA wireless calls. Depending on the location of an exchange, the amount of interMTA traffic (to which access rates apply) can be small or it can be substantial, but the wireless carriers do not provide jurisdictional information that identifies the split between intraMTA and interMTA traffic.

Under SWBT's revised tariff, the wireless carriers were supposed to be held responsible for compensating the MoSTCG companies for terminating wireless traffic. SWBT's revised wireless tariff language states:

> Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carrier's network unless the wireless carrier has entered into an agreement to directly compensate that carrier for the termination of such traffic.

Nevertheless, wireless carriers continued to send and SWBT continued to deliver wireless calls to the MoSTCG exchanges regardless of whether or not there was a compensation or interconnection agreement in place with the MoSTCG companies. Thus, after February of 1998, the wireless traffic (both intraMTA and interMTA) continued to be delivered to the MoSTCG companies, but no one paid the MoSCTG companies for terminating the traffic.

E. The Missouri STCG Wireless Termination Tariffs

As explained above, most wireless carriers, and in particular the CMRS Petitioners, have ignored the MoPSC's requirement to establish agreements and gamed the system in order to avoid their obligations to compensate the MoSTCG for the use of their facilities and services. To address the situation, a group of small Missouri ILECs including members of the MoSTCG filed

wireless termination service tariffs which applied to wireless-originated traffic delivered to their exchanges in the absence of a compensation or interconnection agreement. Specifically, the wireless tariffs established rates, terms, and conditions for intraMTA, wireless-to-wireline traffic where the originating carrier and the terminating LEC are indirectly interconnected and the traffic is transported by an intervening LEC, such as SWBT.

The MoSTCG wireless termination tariffs are not interconnection agreements or reciprocal compensation arrangements. In fact, the wireless tariffs expressly state that they will be superceded by an approved compensation or interconnection agreement. The tariff language states:

> This tariff applies except as otherwise provided in 1) an interconnection agreement between a [wireless] provider and the Telephone Company approved by the Commission pursuant to the Act; or 2) a terminating traffic agreement between the [wireless] provider and the Telephone Company approved by the Commission.

Thus, the tariffs do not conflict with the negotiation provisions of the Act.

The MoSTCG tariff rates are the sum of each small company's traffic-sensitive access rate elements plus two cents for the use of the local loop. These rates range from roughly $0.05 to $0.075 per minute of use (MOU), with an average of roughly $0.06. The wireless tariff rates are lower than the small companies' access rates, which on average are $0.11 per MOU. The wireless tariff rates are also much lower than their respective forward-looking economic costs of providing that service as developed using the HAI forward-looking cost model, which average roughly $0.095 per MOU. Conversely, SWBT's wireless tariff rate of roughly $0.043 is higher

than SWBT's access rates and much higher than SWBT's forward-looking cost of less than $0.005 (as developed by the HAI model).

Thus, cost of service information for the MoSTCG companies was provided to the MoPSC in the record, and the MoPSC approved the rates after an evidentiary hearing. In approving the tariffs, the MoPSC specifically observed that the MoSTCG companies' costs are high and that these high costs are reflected in the tariff rates. None of the wireless carriers in the proceeding presented any forward-looking cost information for the MoSTCG companies. The MoPSC observed that, in approving the tariffs, "an incentive is created for the CMRS carriers to do what Congress expects them to do, namely, negotiate agreements with the small LECs."[9]

The CMRS Petitioners claim that the MoSTCG's wireless termination tariffs "unilaterally set unfair and unlawful terms and conditions for interconnection and employ non-TELRIC prices." The CMRS Petitioners' arguments are simply not true. First, the tariffs were approved by the Missouri Public Service Commission after notice and contested case proceeding. The wireless carriers participated vigorously in the hearings before the MoPSC, and they have appealed the decision to the Missouri Court of Appeals.[10] Second, the CMRS Petitioners' argument contradicts their assertion that they stand ready to negotiate or arbitrate agreements. If the CMRS Petitioners truly believe that the tariffs are unfair and unlawful, then the Act provides a clear remedy with its requirements for ILECs to negotiate interconnection agreements and

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[9] *In the Matter of Mark Twain Rural Telephone Company,* MoPSC Case No. TT-2001-139, *Report and Order*, issued February 8, 2001, p. 46.

[10] *Sprint Spectrum L.P. v. Missouri Public Service Comm'n*, Missouri Court of Appeals Case No. WD 60928 (briefed, argued, and awaiting decision).

reciprocal compensation arrangements. Under the Act, the CMRS Petitioners can force the MoSTCG companies to negotiate, and if necessary, arbitrate, an interconnection or compensation agreement that will supercede the tariffs.

The CMRS Petitioners' actions contradict the arguments in the CMRS Petitioners' petition. For example, T-Mobile has been sending traffic to the Missouri STCG companies for years without paying for it. Even after the Missouri STCG wireless termination tariffs were approved in February 2001, T-Mobile has refused to compensate the small companies for the use of their facilities and services. It was only after a number of the MoSTCG companies filed a formal complaint with the MoPSC in May of 2002 that T-Mobile finally stepped up to the plate and initiated negotiations.[11] The Commission should not reward the CMRS Petitioners' unlawful actions by granting their Petition. Instead, the Commission should clarify that the MoSTCG companies are entitled to compensation from the CMRS Petitioners for their use of the MoSTCG companies' facilities and services.

F. Negotiations and Incentives

The CMRS Petitioners also claim, "Some small ILECs have decided, however, to bypass the bilateral negotiation process mandated by the Communications Act and the Commission's LEC-CMRS interconnection policies." But the opposite is true. In Missouri, the CMRS Petitioners have chosen to bypass the procedures in the Act by sending wireless-originated calls to the MoSTCG companies in the absence of an approved compensation or interconnection

[11] Another one of the CMRS Petitioners, Western Wireless, was also named in the formal complaint, but to date Western Wireless has still not sought to initiate negotiation.

agreement. Therefore, the MoSTCG companies filed wireless termination service tariffs that would apply to this uncompensated wireless traffic unless and until a compensation or interconnection agreement under the Act was approved. The MoSTCG's tariffs do not bypass the Act. Rather, the tariffs are expressly subordinated to any approved agreement under the Act. It is the CMRS Petitioners that have bypassed the Act and failed to comply with the specific requirements of the MoPSC by sending traffic without an agreement. It was only after the MoSTCG companies filed a formal complaint with the MoPSC that the CMRS Petitioners finally sought to negotiate an agreement.

The CMRS Petitioners complain that if wireless tariffs "are allowed to take effect, ILECs then have no incentive to negotiate fair and lawful prices, terms and conditions." Here again, the CMRS Petitioners misstate the law, turn logic on its head, and ignore the facts. As a threshold matter, the Act requires the ILECs to negotiate reciprocal compensation arrangements. 47 U.S.C. § 251(b). Thus, if the CMRS Petitioners had really wanted an agreement with the STCG companies, they could have had one years ago. But if the CMRS Petitioners are allowed to deliver traffic for free over an unlawful indirect interconnection, then what incentive do they have to negotiate? The history in Missouri has shown that until the wireless tariffs were approved, the CMRS Petitioners, along with most of the other wireless carriers, sidestepped their obligations under the Act as long as possible in order to receive free call termination. The Commission should reject the CMRS Petitioners' efforts to make an end run around the Act's requirements.

The MoSTCG member companies have repeatedly shown that they are willing to negotiate. In fact, a number of the MoSTCG companies are presently in negotiations with a

number of large wireless carriers. For example, the MoSTCG companies are finalizing an agreement with Verizon Wireless. After initial negotiations with Sprint PCS reached an impasse, negotiations were restarted in June 2002 and are continuing. Negotiations were also held with AT&T Wireless, and three issues were identified for arbitration. However, neither AT&T nor the MoSTCG sought arbitration, and AT&T continues to pay for its traffic termination pursuant to the MoSTCG wireless tariffs. Direct interconnection agreements have already been reached between certain individual MoSTCG member companies and smaller wireless carriers such as Dobson Wireless and Mid-Missouri Cellular.

As noted previously, the MoSTCG companies are presently in negotiations with Petitioner T-Mobile. Although T-Mobile has been sending traffic to the MoSTCG companies for years, it was only after the approval of the MoSTCG wireless tariffs and after a formal complaint before the MoPSC that T-Mobile finally sought negotiations. These facts dispel T-Mobile's claims and demonstrate that the MoSTCG companies are willing to negotiate with wireless carriers. Moreover, T-Mobile's history in Missouri shows that until the MoSTCG wireless termination tariffs were approved, T-Mobile had no incentive to negotiate and avoided its obligations under the Act.

If negotiations do not produce a satisfactory agreement, then the Act provides the wireless carriers with a mechanism to arbitrate agreements. The STCG recognizes its duty to arbitrate under the Act, and has the STCG is ready to arbitrate if necessary. In fact, when negotiations with ALLTEL Wireless broke down in Missouri, it was the MoSTCG companies that filed for arbitration. The MoPSC dismissed the arbitration on a technicality for all but one of the

MoSTCG companies. Rather than pursue arbitration with that one small company, ALLTEL signed that company's proposed agreement, which contains a rate lower than the tariff rate.[12] ALLTEL continues to pay other MoSTCG companies their wireless tariff rates.

The CMRS Petitioners complain that LECs have no incentive to negotiate and that tariffs take away the wireless carriers' "limited bargaining power." But before the tariffs were approved, the small ILECs had absolutely no bargaining power because the wireless carriers were sending their traffic through SWBT and terminating their traffic in the absence of an approved agreement. The CMRS Petitioners paid nothing, and the MoSTCG companies were unable to identify the unlawful wireless-originated traffic because it was commingled with other traffic on SWBT's common trunk groups. Thus, the CMRS Petitioners had no incentive to negotiate, and they have ignored their legal obligation to establish agreements. Instead, the CMRS Petitioners have sought to establish an illegal and inappropriate status quo and then argue that ILECs have the responsibility to change it. The CMRS Petitioners' position can only be characterized as "catch us if you can."

G. Section 332

The CMRS Petitioners quote Section 332(c)(1) for the proposition that the FCC must address their Petition, but Section 332 involves direct interconnection, not indirect interconnection:

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[12] *Grand River Mutual Telephone Corporation's application for approval of a wireless interconnection agreement with ALLTEL Communications, Inc.*, Case No. TO-2002-147, *Order Approving Interconnection Agreement*, issued Oct. 16, 2001.

> Upon reasonable request of any person providing commercial mobile radio service, the Commission shall order a common carrier to **establish physical connections** with such service pursuant to the provisions of section 201 of this title.

(emphasis added). Section 332 offers no basis for the FCC to assert jurisdiction and mandate terms for the indirect interconnection between CMRS carriers and small rural ILECs. Section 332 clearly addresses direct interconnection, but the CMRS Petitioners seek to void the Missouri tariffs which only address indirect interconnection. What the CMRS Petitioners really seek is something quite different from direct interconnection: they want to continue sending wireless calls to rural ILECs over indirect interconnections with RBOCs and skirt paying their fair share of connecting with rural America.

H. Land-to-Mobile Calls

The CMRS Petitioners complain that small ILECs will not pay terminating compensation to wireless carriers for land-to-mobile calls within the MTA. It is untrue that the MoSTCG companies will not pay terminating compensation for traffic that they are responsible for carrying. What the MoSTCG companies do not believe they are required to do is to pay terminating compensation for calls they do not carry, such as IXC-carried calls. The vast majority of traffic from small rural exchanges to wireless carriers is handled by interexchange carriers (IXCs). If an IXC handles the call, then the call is between the IXC's end user, offered under the IXC's tariff or price list, and is not a call between the LEC and the wireless carrier. Nothing in the 1996 Act or the FCC's *Interconnection Order* discusses changing the dialing schemes or business relationships

which would be required by the CMRS Petitioners' interpretation. Rather, the FCC's *Interconnection Order* specifically recognizes that calls subject to access charges at the time of the order would continue to be subject to access charges and not to reciprocal compensation.[13]

The Act does not require small rural ILECs to deliver traffic to the CMRS providers' urban facilities for free. The FCC has recognized that some landline customers must make toll calls to reach wireless customers even though the call is within the MTA. In that regard, the FCC found that its interconnection rules only affected intercarrier compensation between a LEC and a CMRS carrier, not the rates a LEC charges its own end user customer. In the *TSR Wireless* case,[14] the FCC explained that it is appropriate for a LEC to continue to charge toll to its customers to reach CMRS subscribers outside the LEC's local calling area. Alternatively, the LEC can offer the CMRS carrier a wide area (or reverse toll billing) calling plan. If the wireless carrier subscribes to the wide area calling plan, then it must pay the LEC the toll charges on those LEC originated calls.

In the case of the MoSTCG companies, the vast majority of these small ILECs only provide local exchange calling to their customers. Toll calling is provided by the end user's presubscribed (or chosen) long distance carrier in accordance with the equal access requirements of the FCC and the MoPSC. Following the FCC's reasoning in the *TSR Wireless* case, nothing in

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[13] *See* ¶ 1043 ("Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges and are assessed such charges for traffic currently subject to interstate access charges.")

[14] *In the matter of TSR Wireless v. U.S. West Communications,* 15 FCC rcd 11166, Release No. FCC 00-194, released June 21, 2000.

the FCC's interconnection rules affected the relationship that the carriers had with their end user customers or the way in which they charged their end user customers for their services. Thus, IXC-carried calls before the Act remained IXC-carried calls after the Act, and the responsibility for paying intercarrier compensation (both originating and terminating access) on those calls remained with the IXCs.

The issue of land-to-mobile traffic has already been raised and abandoned by at least one other CMRS carrier. On June 22, 1998, Sprint PCS filed an informal complaint with FCC against a number of the MoSTCG companies alleging refusal to negotiate and failure to accept reciprocal compensation obligations for toll (1+ dialed) calls.[15] After a meeting with representatives of Sprint PCS and the MoSTCG, the FCC took no action, and Sprint PCS did not pursue a formal complaint nor did it pursue further negotiation or arbitration.

In fact, Sprint PCS appears to now recognize that it must seek compensation from the IXCs rather than the small ILECs. Indeed, Sprint PCS has recently brought this position before the FCC, and the FCC determined that wireless carriers may impose access charges on IXCs for traffic IXCs terminate to wireless carriers provided there is an agreement, express or implied, to do so.[16] Thus, if the FCC accepts the CMRS Petitioners' argument in this case, it will open the door for the wireless carriers to be compensated three times for the same call: once by their end-

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[15] *In the matter of the Informal Complaint of Sprint Spectrum, L.P., Complainant v. BPS Telephone Company et al.*, File No. IC-98-16655.

[16] *In the matter of Petition of Sprint PCS and AT&T Corporation for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, *Declaratory Ruling*, released July 3, 2002.

user customers, once by the IXCs, and once by the small rural ILECs. The FCC should reject this absurd result.

I. The CMRS Petitioners are gaming the system.

The CMRS Petitioners' arguments in this case demonstrate that they will stop at nothing to avoid paying for their use of small rural companies' facilities and services. The history of this dispute in Missouri highlights the fact that the CMRS Petitioners would rather refuse to pay the small companies and pursue years of costly and time-consuming litigation rather than employ the clear procedures available to them under the Act. Now that a formal complaint against T-Mobile and Western Wireless for nonpayment of services is pending before MoPSC, the CMRS Petitioners present tortured legal arguments to the FCC in hopes of avoiding what they should have been doing all along: paying for the facilities that they use and the services that they receive.

Under the Act, T-Mobile and Western Wireless have the choice of complying with the MoSTCG tariffs or negotiating an agreement. Instead, T-Mobile and Western Wireless chose to send traffic without an agreement and without paying the MoSTCG tariff rates. It was only after the MoSTCG companies filed a formal complaint with the MoPSC that T-Mobile sought to negotiate an agreement with the Missouri STCG companies, and Western Wireless still has yet to seek negotiations. The complaint is still pending before the Missouri Commission, and T-Mobile and Western Wireless continue to unlawfully send traffic absent an agreement and in violation of the MoSTCG wireless tariffs.

Another way the CMRS Petitioners attempt to avoid their obligation to pay for their traffic is by refusing to provide traffic information. For example, depending on where a rural exchange is located, the percentage of interMTA traffic can be substantial. The wireless carriers' legal arguments break down when it comes to interMTA traffic because access rates clearly apply to this traffic. Although there is no question that some of their traffic is interMTA traffic, the CMRS Petitioners have not provided any jurisdictional information that would identify whether the traffic they are sending intraMTA or interMTA traffic. Not surprisingly, the CMRS Petitioners have made no effort to identify or pay for the interMTA traffic that they are sending to small companies' exchanges. Instead, the CMRS Petitioners stubbornly refuse to pay anything for the facilities that they use and the services they receive.

J. Confiscation and Public Policy

When the MoPSC approved the MoSTCG wireless tariffs, the MoPSC recognized that state and federal law prohibit the state from confiscating the use of the property of a public utility by fixing rates so low as to deprive the utility of reasonable compensation for such use. *McGrew v. Missouri Pacific Ry. Co.*, 230 Mo. 496, 132 S.W. 1076 (Mo. banc 1910). The MoPSC specifically observed that the MoSTCG companies and their owners have a constitutional right to a fair and reasonable return on their investment. Thus, the reasonableness of the rates charged by a public utility "must be determined with due regard to the due process and equal protection clauses of both federal and state constitutions and the statutes of the state in which a utility

operates." *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 714 (Mo. 1958).

Wireless carriers must compensate the MoSTCG companies for the wireless calls that are being delivered to the MoSTCG company exchanges. Neither the FCC or the MoPSC can allow wireless calls to continue terminating to the MoSTCG companies' exchanges for free because this is clearly confiscatory. *See Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587; 46 S.Ct. 408, 409-410 (1926) ("Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them.").

It is costly for the MoSTCG companies to provide service in rural America, and wireless carriers should be required to pay for the services that they receive in rural exchanges. If the CMRS Petitioners are not willing to establish an agreement pursuant to the Act, then the CMRS Petitioners should expect to pay the wireless termination tariff rates (which are less than the access rates that other carriers pay). As a matter of public policy, the wireless carriers must pay their fair share. Otherwise, rural customers and other carriers will end up subsidizing the wireless carriers and their customers.

The CMRS Petitioners complain that the small ILECs want to be compensated "despite the small volume of traffic exchanged with carriers indirectly interconnecting with them." Although the amount of traffic may be small to the wireless carriers, it is becoming more and more substantial to the MoSTCG companies. A recent analysis shows that an average of nearly 14% of the total interoffice minutes terminating to a group of twenty-four small Missouri companies is wireless-originated traffic. The analysis shows 43,820,412 wireless-originated

terminating MOU for these twenty-four companies on an annualized basis. The simple fact of the matter is that until the wireless carriers begin to pay their fair share of the costs of connecting with rural Missouri, the small companies' end user customers and other carriers that play by the rules (such as lXCs) will end up subsidizing the wireless carriers' use of the small companies' facilities and services. This problem will only continue to grow as wireless-originated traffic continues to increase.

III. CONCLUSION

The FCC should reject the CMRS Petitioners' efforts to avoid compensating small ILECs, and the FCC should affirm the MoPSC's holding in the *Mark Twain Wireless Tariff* case. There are no approved bill-and-keep arrangements between the CMRS Petitioners and the MoSTCG companies, and there is nothing unlawful about wireless termination tariffs that establish the rates, terms, and conditions for wireless-originated traffic that is delivered in the absence of an approved compensation or interconnection agreement. If the CMRS Petitioners really wanted an agreement, then the Telecommunications Act provides them with a clear mechanism for establishing a compensation or interconnection agreement. Unfortunately, the history in Missouri demonstrates that the wireless carriers would rather avoid their obligations to compensate the small companies. The CMRS Petitioners' use of the MoSTCG's facilities and services is unlawful and unreasonable, and the FCC should not reward the CMRS Petitioners for their unlawful actions.

Respectfully submitted,

/s/ Brian T. McCartney

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, on this 18th day of October, 2002 to the following:

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Washington, D.C. 20554

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/s/ Brian T. McCartney
W.R. England/Brian T. McCartney

ATTACHMENT A

Missouri Small Telephone Company Group

BPS Telephone Company
Cass County Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Fidelity Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corp.
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Co., Inc.
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Company
Stoutland Telephone Company